No. 96-1560 (4)

Supreme Court, U.S.
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THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

ELLEN P. FULFREE,

Petitioner,

against

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counterstatement of Questions Presented

I. Whether this Court should grant certiorari to review the Memorandum Decision and Order of the United States District Court dated January 2, 1996, which is an interlocutory order from which there is no right of immediate appeal?

II. Whether this Court should grant certiorari to review petitioner's Motion to remand to the state court, even though removal applies to diversity actions and the trial Court properly exercised its broad discretion in denying petitioner's Motion and granting respondents leave to amend the Notice of Removal?

III. Whether this Court should grant certiorari to review a Summary Order of the United States Court of Appeals for the Second Circuit dismissing petitioner's appeal for lack of appellate jurisdiction?

Respondents respectfully answer these questions in the negative.

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No. 96-1560

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ELLEN P. FULFREE,

Petitioner,

-against-

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Respondent Robert Manchester is an attorney who has been a citizen, registered taxpayer, and voter in Vermont since 1969. Respondent has not been a citizen of New York since 1969 (A. 94).

Respondents agreed to represent petitioner in 1981, when respondent Robert Manchester was a member of a Vermont

partnership (A. 94-95). Mr. Manchester left that partnership in 1983 to form a own professional corporation in Vermont (A. 95).

Respondent Manchester Law Offices is a citizen only of Vermont. It is incorporated in Vermont and has its principal place of business in Vermont. (A. 95).

Respondents' only office is in Vermont. The day-to-day control of the cases takes place at the Vermont office, the files are kept in Vermont, and all administrative functions take place in Vermont, since that is where the sole office is located (A. 95-96).

Respondents agreed to represent petitioner in an action for personal injuries against the A.H. Robins Co., Inc. in 1981. An action was filed in the United States District Court for the District of Maryland. The action was then transferred to the related multidistrict litigation (A. 96).

Upon remand from the multidistrict litigation, respondents filed a separate action for petitioner in the United States District Court for the Southern District of New York. The action was awaiting trial when A.H. Robins Co., Inc. filed for bankruptcy (A. 96-97).

A Notice of Claim was filed by respondents on behalf of petitioner in the bankruptcy proceedings. Respondents obtained an order lifting the stay and allowing petitioner's case to proceed to trial in the United States District Court for the Southern District of New York (A. 97).

On January 6, 1995, respondents filed a motion to withdraw as attorney of record for petitioner (A. 42-43). Judge Keenan signed an order granting the motion (A. 98).

Petitioner commenced this lawyer malpractice action against respondents by filing a summons and complaint in the Supreme Court, Westchester County on or after August 15, 1995 (A. 16). Respondents duly filed a Notice of Removal on September 7, 1995 removing this action to the United States District Court for the Southern District of New York (A. 68-70).

The basis for subject matter jurisdiction in the United States District Court for the Southern District of New York is that complete diversity of citizenship exists, and the amount in controversy exceeds the sum or value of $50,000. 28 U.S.C. 1332. Petitioner, a resident and citizen of New York, claims respondents, who are residents and citizens of Vermont, committed legal malpractice.

Petitioner moved to remand the case to the Supreme Court, Westchester County (A. 49). Respondents duly opposed the motion, and requested leave to serve an amended notice of removal (A. 82-87).

By Memorandum Decision and Order dated January 2, 1996, the United States District Court denied petitioner's Motion, and granted respondents leave to file an amended notice of removal (A. 5-8). Respondents duly served and filed the Amended Notice of Removal (A. 44-46).

Petitioner filed a Notice of Appeal from the Memorandum Decision and Order of the United States District Court dated January 2, 1996. Petitioner did not make any written application

for certification of the District Court's Order under 28 U.S.C. 1292(b).

Respondents then advised petitioner that the Order of the United States District Court is an interlocutory order from which there is no right to immediate appeal. Respondents requested that petitioner withdraw her appeal (A. 47).

By Order dated February 2, 1996, the United States Court of Appeals for the Second Circuit dismissed petitioner's appeal based upon petitioner's failure to file and serve a Pre-Argument Statement and serve a Form D Statement. Petitioner then moved in the United States Court of Appeals for the Second Circuit for an order treating her appeal as a mandamus application,excusing late filing of Preargument Statements C and D, and allowing the forms to be filed *nunc pro tunc*.

By Order dated March 1, 1996, the United States Court of Appeals for the Second Circuit granted petitioner's motion only to the extent that the dismissal of the appeal for failure to timely file Forms C and D is vacated and the appeal is reinstated.

By correspondence dated March 11, 1996, respondents again advised petitioner that there is no right of immediate appeal from the Memorandum Decision and Order dated January 2, 1996, and that petitioner was denied leave to treat the appeal as a mandamus application. Withdrawal of the appeal was requested (A. 48). Petitioner decided to continue to pursue her appeal.

By Summary Order filed October 4, 1996, the United States Court of Appeals dismissed petitioner's appeal for lack of appellate jurisdiction. The Court of Appeals held that an order of a district court denying a motion to remand an action back to

state court is an interlocutory order that is not immediately appealable under 28 U.S.C. §1291.

REASONS FOR DENYING THE WRIT

I. The Order of the District Court denying remand of this diversity action commenced in state court is an interlocutory order from which direct appeal cannot be taken.

The Memorandum Decision and Order of the United States District Judge dated January 2, 1996 is an interlocutory order from which there is no right of immediate appeal. There are no special or important reasons for review of the dismissal of this appeal for lack of appellate jurisdiction: There is no conflict among the Circuits and there are no novel or important questions with respect to the absence of appellate jurisdiction with respect to an interlocutory order such as an order denying a motion to remand to state court.

Petitioner's instant appeal is not authorized by any statute. Section 1447(d) of Title 28, upon which section petitioner relies for the claim that she may appeal from the Order denying her motion to remand to state court, allows appellate review of an order "remanding a case to the State court from which it was removed pursuant to section 1443 of this title..."

The Memorandum Decision and Order of the United States District Court dated January 2, 1996 is not an order "remanding a case to the State court..." To the contrary: The Memorandum Decision and Order denied remand.

Also, this case was not "removed pursuant to section 1443..." Section 1443 pertains to removal of civil rights claims. The case

at bar is not a civil rights case, and was not removed pursuant to section 1443.

This case is a diversity action sounding in alleged lawyer malpractice, and was removed pursuant to section 1441. Under section 1441(a), any civil action brought in a state court of which the United States district court has original jurisdiction may be removed.

The United States District Court for the Southern District of New York has original jurisdiction of petitioner's state court action [commenced in Supreme Court, Westchester County] because of diversity of citizenship and the amount in controversy. 28 U.S.C. 1332.

Petitioner has other adequate means to attain the relief she seeks: The Memorandum Decision and Order denying remand is reviewable on any appeal from the final judgment. See, e.g., *Ex parte Hoard*, 195 U.S. 578, 15 Otto 578, 26 L.Ed. 1176 (1881); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860 (7th Cir. 1984). The rule making an order denying remand not reviewable on appeal is to avoid undue delay and interruption of litigation.

In addition, petitioner did not made any written application for certification of the District Court's Order under 28 U.S.C. 1292(b). Nor was there any basis for certification, since there is no substantial difference of opinion as to any controlling question of law.

Petitioner's application to treat this appeal as a mandamus application was denied by Order of the United States Court of Appeals dated March 1, 1996. There is no appellate jurisdic-

tional basis for the United States Court of Appeals to adjudicate petitioner's instant appeal.

Petitioner will not suffer any damage or prejudice in a way not correctable on appeal, as a result of the denial by the United States Court of Appeals of appellate review. There are no other lawsuits between the parties; the instant action is the only lawsuit. Nor did petitioner identify or even claim in the trial Court any prejudice or damage.

Nor does the Memorandum Decision and Order of the United States District Court raise any new or important problems, or any issues of law of first impression. Appellate review of the interlocutory Memorandum Decision and Order of the United States District Court dated January 2, 1996 would not advance any determination of, or construction of a federal procedural rule in a new context.

Petitioner is not damaged or prejudiced in any way not correctable on appeal. The need for petitioner to incur the cost of further litigation below before finding out whether the district court properly denied the motion to remand is not the type of prejudice that justifies immediate appellate review of an order denying a motion to remand. *Rohrer, Hibler & Replogle, Inc. v. Perkins*, supra, 728 F.2d 860, 862.

II. Petitioner's appeal was dismissed without consideration of the merits of the appeal

The United States Court of Appeals for the Second Circuit dismissed petitioner's appeal for lack of appellate jurisdiction. No decision or order was issued by the Court of Appeals with respect to the merits of petitioner's appeal.

In petitioner's petition for writ of certiorari, Questions 2-6 presented by petitioner pertain to issues which, while raised by petitioner in the Court of Appeals, were not considered by the Court of Appeals in issuance of the Summary Order dismissing the appeal for lack of appellate jurisdiction. This Honorable Court should give no consideration to Questions 2-6 in petitioner's petition, but instead should leave the issues for the consideration of the courts below if duly presented by petitioner.

This Honorable Court gives no consideration to issues in the record that are not considered by the Court of Appeals. Instead, this Honorable Court leaves those issues to be considered for what they are worth by the courts below. *F.T.C. v. Travelers Health Association*, 302 U.S. 293, 80 S.Ct. 717 (1960).

A writ of certiorari is improvidently granted if the issues are not ruled upon in the court below. *Mishkin v. State of New York*, 383 U.S. 502, 86 S.Ct. 958 (1965). Questions 2-6 of petitioner's petition were not adjudicated by the Court of Appeals, as the appeal was dismissed for lack of appellate jurisdiction. This Honorable Court should decline to reach the merits of petitioner's appeal.

III. The dismissal of petitioner's appeal for lack of appellate jurisdiction does not deprive petitioner of any Constitutional right

The dismissal of petitioner's appeal for lack of appellate jurisdiction does not deprive petitioner of either due process or equal protection.

Contrary to petitioner's contention, there is a rational basis for dismissing the appeal rather than issuing an order, "Affirmed without opinion". An affirmation, even if "without opinion", is

an implicit acknowledgement of appellate jurisdiction over the appeal.

In this appeal, the order from which appeal is taken is an interlocutory order that is not immediately appealable under section 1291 of Title 28 of the United States Code. It is rational for the Court of Appeals to dismiss an appeal for lack of appellate jurisdiction [which dismissal has no precedental value with respect to the merits of the appeal] rather than to affirm without opinion [which would be an adjudication of the merits of the appeal].

Petitioner has not been deprived of any due process or equal protection right. Petitioner is entitled to appeal from the final judgment and raise on that appeal the validity of the Order of the District Court denying petitioner's motion to remand. *Air Line Pilots Association, Int'l v. UAL Corp.*, 897 F.2d 1394 (7th Cir. 1990).

In addition, petitioner did not made any written application for certification of the District Court's Order under 28 U.S.C. 1292(b). Petitioner cannot complaint of deprivation of constitutional rights, when petitioner did not even avail herself of rights that were available!

Petitioner refers to the Order of the United States Court of Appeals as a "secret disposition" (Petition, p. 17). Yet, there is nothing "secret" about the disposition: The Court of Appeals gave a thorough discussion of the reason why it lacked appellate jurisdiction.

IV. This action was properly removed from state court to the United States District Court, under diversity jurisdiction

Diversity jurisdiction exists in this case. Removal to federal court was properly based upon diversity jurisdiction. No special, important, or novel question exists as to removal of actions based upon diversity jurisdiction exists that would warrant review by this Honorable Court of this appeal.

Any case that could have been commenced in federal court based on diversity of citizenship can be removed from state court on that ground. 28 U.S.C. 1441(a, b).

Remand is allowable if there is lack of subject matter jurisdiction or there is a defect in the removal procedure. Here, there are no defects warranting remand, and there is complete diversity of citizenship. Petitioner is a citizen of New York, and both respondents are citizens of Vermont.

Respondent Manchester is a citizen of Vermont (A. 94). Respondent Manchester Law Offices is incorporated in Vermont and has a principal place of business in Vermont (A. 95, 99). Accordingly, Manchester Law Offices is a citizen only of Vermont. 28 U.S.C. 1332(c).

There is no conflict among the Circuit Courts as to the ability of a defendant to remove from state court to federal court a lawsuit based upon diversity jurisdiction. Nor is any substantial question raised by petitioner as to the removability of this diversity action.

Petitioner is incorrect, as a matter of law, in claiming that respondents have no authority to remove this case to federal court, and that the District Court has no authority to deny the

motion to remand. There is no authority to support petitioner's position; there is no controversy or question in any Circuit that section 1441 of Title 28 of the United States Code allows removal of cases based upon diversity rather than federal question jurisdiction.

Petitioner relies upon subsection (c) of section 1441. That section provides as follows:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Petitioner argues that since there is nothing in the complaint hinting of a federal question, removal is prohibited.

In her petition, petitioner has raised and then demolished a "straw man". Subsection (c) of Section 1441 applies when jurisdiction is conferred by section 1331 ["Federal question" jurisdiction]. In that case, remand is permitted when state law predominates over the federal questions.

The case at bar is a diversity action—not a "federal question" action. Subject matter jurisdiction is conferred based upon diversity of citizenship [Section 1332], and not based upon any federal question [Section 1331].

The case at bar was removed pursuant to Section 1441(a), and not pursuant to Section 1441(c). Under section 1441(a), any civil action brought in a state court of which the United States

district court has original jurisdiction may be removed. The United States District Court for the Southern District of New York has original jurisdiction of plaintiff-appellant's state court action [commenced in Supreme Court, Westchester County] because of diversity of citizenship and the amount in controversy. 28 U.S.C. 1332.

The statutory construction provided by petitioner is faulty, as a matter of law, and has not been adopted in any federal Circuit. The removal of this case to the United States District Court, and the District Court's denial of petitioner's motion to remand, comport with the removal statute and present no substantial, important, or novel question for review.

V. The United States District Court possesses full power to grant leave to serve an amended notice of removal

Remand for procedural defects rests in the sound discretion of the federal court. Every step taken by respondents to remove has been in strict accordance with the federal statutes and rules.

There are no substantial, novel, or important questions of law for this Honorable Court to consider in this appeal with respect to the amended notice of removal. None of the alleged defects in the Notice of Removal were fundamental. There is no split of authority among the Circuits that would warrant a grant of a writ of certiorari on the issues raised in this appeal with respect to removal.

A defect will not make a notice of removal fatally flawed as long as the removal court can ascertain an adequate basis for removal. *Harlem River Produce Co. v. Aetna Casualty & Surety Co.*, 257 F.Supp. 160 (S.D.N.Y. 1965). Defects in the form or content of the removal papers are usually not jurisdictional and

may be cured by amendment after removal. *Usatorres v. Marina Mercante Nicaraguenes*, S.A., 768 F.2d 1285 (11th Cir. 1985).

Respondents have asserted in the Notice of Removal diversity jurisdiction. Even a failure to state a valid grounds for removal (and defendants-appellees have stated valid grounds) may be cured by amendment of the Notice, if jurisdiction existed at the time of removal. *Gafford v. General Elec. Co.*, 997 F.2d 150 (6th Cir. 1993). That is particularly true as the allegations of diversity jurisdiction were not omitted. 28 U.S.C. 1653.

Removal based upon diversity is proper, even without the Notice specifying the place of incorporation and the location of the principal place of business. A defendant may amend the Notice of Removal to allege diversity with the requisite specificity. Any alleged defect is only "formal", since diversity in fact exists. *Barrow Develop. Co. v. Fulton Ins. Co.*, 418 F.2d 316 (9th Cir. 1969).

Complete diversity of citizenship exists between the parties. As the case was removable based upon diversity of citizenship, the trial Court properly exercised jurisdiction despite any alleged defects. *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985). The granting of leave to amend the Notice of Removal was a proper exercise of the trial Court's broad discretion, and presents no issues worthy of review.

(a) The amended notice of removal was timely served

Petitioner is incorrect to claim and infer that either the Notice of Removal or Amended Notice of Removal are untimely (Petitioner's Petition, p. 18).

The summons and complaint was filed in the Supreme Court, Westchester County on or after August 15, 1995, and process was served upon removing defendants-appellees on August 23, 1995 (A. 11). The original Notice of Removal was filed on September 7, 1995 [A. 11]—well within the 30-day time limit.

A proposed amended notice of removal was attached to respondents' Affirmation dated October 18, 1995 in opposition to petitioner's Motion to remand (A. 111). Leave to serve the amended notice of removal was requested in the Affirmation dated October 18, 1995 (A. 86-87).

By Memorandum Decision and Order dated January 2, 1996, the United States District Court granted leave to file the amended notice of removal within 20 days of the order (A. 8). The amended notice of removal was served and filed by January 6, 1996, in conformity with the Order of the United States District Court. Accordingly, the Amended Notice of Removal was timely and properly served and filed.

(b) Defense counsel complied with Rule 11, FRCP

Defense counsel's signature appears in his individual name, as required by section (a) of Rule 11. That Rule does not require that owners of the lawfirm sign the document; it requires only that the document be signed "by at least one attorney of record in the attorney's individual name..."

When petitioner's counsel objected in the trial Court to the sentence, "Associated with the Firm" that appeared in defense counsel's signature block, defense counsel deleted the sentence from the signature block. This deletion cured the objection raised by petitioner's counsel.

Petitioner's counsel also criticized defense counsel's signature, even though the name was typed underneath. Defense counsel promised petitioner's counsel that defense counsel will sign his name in a neater fashion in the future, and has done so.

(c) *Service of the Notice of Removal*

Petitioner is incorrect to claim that the Notice of Removal is defective based upon service of the Notice (Petitioner's Petition, p. 21). Section 1446(d) provides that a copy of the Notice shall be filed with the clerk of the State court. That was done here: The caption of the Notice of Filing Notice of Removal clearly indicates that the Notice is being filed in the "Supreme Court of the State of New York, County of Westchester", and is directed to the Clerk of the Court (A. 109).

A copy of the Notice of Removal was filed with precisely the individual who the statute says must receive a copy: The Clerk of the Supreme Court of the County of Westchester.

(d) The situs of removal

Petitioner takes respondents to task for not setting forth the "division" to which removal is sought (Petition, p. 22). Petitioner's contention lacks any merit.

The Notice of Removal was filed in the proper District. Removal was effectuated to the Southern District, which has courts held at New York and White Plains (A. 11-13).

The 1996 Edition to the Federal Civil Judicial Procedure and Rules (West Publishing Co.) does not indicate that the Southern District is divided into divisions. Id. at p. 536. Contrast that

with, for example, Minnesota (which "constitutes one judicial district comprising six divisions"). Id. at p. 532.

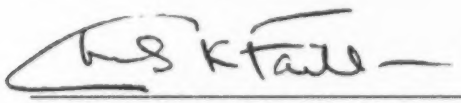
The Civil Cover Sheet merely asks which location to which the case should be assigned (A. 107). Respondents selected Foley Square, as the underlying personal injury action on which this legal malpractice action is based is venued in the Southern District, Foley Square.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
March 17, 1997

Respectfully submitted,



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APPENDIX A—Order of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of October one thousand nine hundred and ninety-six.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE PIERRE N. LEVAL,
HONORABLE WILLIAM A. NORRIS*,

Circuit Judges.

---

*Honorable William A. Norris, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

---x

ELLEN P. FULFREE,

Plaintiff-Appellant,

- v. -

ROBERT MANCHESTER and MANCHESTER LAW OFFICES,

Defendants-Appellees.

---x

Appearing for Appellant: Richard W. Fulfree, Yonkers, N.Y.
Appearing for Appellees: Martin B. Adams, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

ISSUED, AS MANDATE
10/29/96

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal is dismissed for lack of appellate jurisdiction.

Plaintiff Ellen P. Fulfree appeals from an order entered in the United States District Court for the Southern District of New York, Denny Chin, *Judge,* denying her motion to remand this action to the state court from which it was removed. We dismiss the appeal for lack of appellate jurisdiction. An order of the district court denying a motion to remand an action to state court is an interlocutory order that is not immediately appealable

pursuant to 28 U.S.C. § 1291. *See, e.g., Wilkins v. American Export-Isbrandtsen Lines, Inc.*, 401 F.2d 151 (2d Cir. 1968). We reject plaintiff's argument that, simply because 28 U.S.C. § 1447 provides that certain orders granting remands are not appealable, an order denying a remand is appealable immediately. No case has so held, and, in light of the statutory structure governing appeals, *see* 28 U.S.C. §§ 1291, 1292, and the strong federal policy against piecemeal appeals, *see generally Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989); *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980); that is not a reasonable interpretation of the statute. The cases on which plaintiff relies in support of her jurisdictional arguments involved either final judgments, which are made appealable by § 1291, or orders granting or denying preliminary injunctions, which are made immediately appealable by § 1292(a). No final judgment has been entered in the present case, and no motion for an injunction is at issue. There being no statutory basis for the present appeal, we lack jurisdiction to hear the appeal.

We have considered all of Fulfree's arguments in support of immediate appealability and have found them to be without merit. The appeal is dismissed for lack of jurisdiction.

s/Amalya L. Kearse, U.S.C.J.
AMALYA L. KEARSE, U.S.C.J.

s/Pierre N. Leval, U.S.C.J.
PIERRE N. LEVAL, U.S.C.J.

s/William A. Norris, U.S.C.J.
WILLIAM A. NORRIS, U.S.C.J.

UNITED STATES COURT OF APPEALS
FILED OCT 4 1996
GEORGE LANGE, III, CLERK
SECOND CIRCUIT